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LAW OFFICES

SMITHWICK & BELENDIUK, P. C.

JUN - 9 1993

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SUITE 510

WASHINGTON, D. C. 20036

TELECOPIER

(202) 785-2804

FEDERAL COMMUNICATIONS COMMISSION

OFFICE OF THE SECRETARY

TELEPHONE
(202) 785-2800

June 4, 1993

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 93-107

Before the
Federal Communications Commission

Washington, D.C. 20554

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JUN - 9 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

DAVID A. RINGER

ASF BROADCASTING CORPORATION

WILBURN INDUSTRIES, INC.

SHELLEE F. DAVIS

WESTERVILLE BROADCASTING

COMPANY LIMITED PARTNERSHIP

MM DOCKET NO. 93-107

File No. BPH-911230MA

File No. BPH-911230MB

File No. BPH-911230MC

File No. BPH-911231MA

File No. BPH-911231MB

does not have "reasonable assurance" of the use of his proposed antenna site from its owner. However, as shown in the documents attached to this pleading, on December 17, 1991, Carl B. Fry, Authorized Representative of Mid-Ohio Communications, Inc. ("Mid-Ohio"), the owner of the former WBBY-FM tower site, sent a letter to Mr. Ringer, in which he stated: "Mid-Ohio Communications, Inc., hereby grants you the authority to specify WBBY-FM's transmitter location in your FCC application." Exhibit 1.¹

2. In the body of his letter, Mr. Fry acknowledged that Mr. Ringer was applying for a new FM station at Westerville, Ohio and he stated that, should Mr. Ringer prevail, that Mid-Ohio "is willing to negotiate appropriate leases with you for certain real property and personal property owned by Mid-Ohio...." Exhibit 1. Mr. Fry's letter listed a dollar figure for the lease of the tower and station equipment (\$6,000 per month), described the exact location of the tower site and included a detailed inventory of the equipment that would be included with the lease.²

Id.

3. Mr. Fry's December 17, 1991 letter also stated that

¹ Mid-Ohio's 1979 renewal for WBBY-FM was denied in 1990. See Mid-Ohio Communications, Inc., 5 FCC Rcd 4596 (1990). Thereafter, Mid-Ohio was forced to discontinue operation of WBBY-FM. Several of the applicants in this case, including Mr. Ringer, have specified the former WBBY tower site as the location for their proposed facilities.

² This inventory list was amended in a correspondence from Mr. Fry dated December 24, 1991. See Exhibit 1.

Mr. Ringer would need to supply Mid-Ohio with a "showing of financial qualifications satisfactory to Mid-Ohio...." within 60 days of the date of the letter. Id. Fry's letter stated further that "Mid-Ohio Communications, Inc. reserves the right to cancel this letter within sixty (60) days of receipt of your financial information." Id.

4. As a result of receiving a copy of Mr. Fry's letter, Mr. Ringer certified the availability of the former WBBY-FM tower site in his Westerville application, which was filed on December 30, 1991. See Exhibit 2. On December 31, 1991, Mr. Ringer, through counsel, forwarded to Mr. Fry a copy of his current "Financial Statement." See Exhibit 3. At Exhibit 4 to this pleading, Mr. Fry verifies, in a recent letter dated June 7, 1993, that Mr. Ringer's financial showing was received by Mid-Ohio before the 60 day deadline had expired and that the December 17, 1991 letter was never

property owner or the owner's representative and had obtained reasonable assurance, in good faith, that the proposed site will be available for the intended purpose.

Instructions For FCC Form 301 (June 1989 version) at page 9; see also Processing of FM and TV Applications, 50 Fed. Reg. 19936, May 13, 1985.

6. As the above facts show, Mr. Ringer has fully satisfied the Commission's "reasonable assurance" standard with respect to his tower site. Mr. Ringer contacted the representative of the owner of his proposed site, negotiated specific terms for the use of the site and equipment (most importantly the price figure), the representative of the site owner was fully aware of Mr. Ringer's proposed use of his site and Mr. Ringer was granted his permission to specify the location in his Westerville application. The entire transaction was memorialized in a detailed letter from the representative of the site owner that was presented to Mr. Ringer before he certified his application. These facts conclusively show that the requisite "meeting of the minds" was reached between Mr. Ringer and the owner of his proposed tower site. See Genesee Communications, Inc., 3 FCC Rcd 3595 (Rev. Bd. 1988). More importantly, Mr. Ringer satisfied the single condition precedent put forth by Mid-Ohio for use of their site, when he submitted the necessary financial showing within the deadline outlined in the December 17, 1991 letter.⁴ To expect Mr. Ringer to have

⁴ Satisfaction of all conditions precedent is an important element in the Commission's analysis of "reasonable assurance". See Cuban-American Limited, 2 FCC Rcd 3264, 3266 (Rev. Bd. 1987).

taken any further steps would be tantamount to requiring absolute assurance in this case, which is very clearly not the Commission's standard.

7. ORA argues that Mr. Fry's letter evidences only a "willingness to deal" with Mr. Ringer and, therefore, did not constitute the necessary "reasonable assurance" that the Commission demands. See Motion at p. 1. However, ORA's argument amounts to a game of semantics. While the Commission expects applicants to undertake at least some basic negotiations with their prospective site owners,⁵ it has also stated that "...rent and other details may be negotiated at a yet undetermined future date..." National Innovative Programming Network, Inc., 2 FCC Rcd 5641, 5643 (1987); see also, Puopolo Communications, Inc., 60 RR 2d 964, 966 (Rev. Bd. 1986). In both George Henry Clay, 5 FCC Rcd 317, 318 (Rev. Bd. 1990) and National Innovative Programming Network, Inc., supra, at 5643, site commitments lacking specific terms were nevertheless found to qualify as "reasonable assurance." Therefore, Commission precedent is clear: not all the details of an arrangement need be formulated prior to an applicant certifying the availability of a proposed tower site. See Elijah Broadcasting Corporation, 3 FCC Rcd 5148 (Rev. Bd. 1988), rev. granted in part, remanded on different grounds, 5 FCC Rcd 5350 (1990). In this case, the most important lease terms (price,

⁵ See Cuban-American Limited, supra, at 3266.

location of tower site, equipment, etc.) were discussed by the parties and agreed to beforehand and thus Mr. Ringer met the Commission's certification standard.

8. Many of the cases cited by ORA, in support of its Motion, involve the situation where a site owner, while allegedly granting consent to use of a tower site, later specifically stated that such use would not be permitted. This was the case in National Communications Industries, 6 FCC Rcd 1978, 1979 (Rev. Bd. 1991) (subsequent history omitted); Rem Malloy, 6 FCC Rcd 5843, 5846 (Rev. Bd. 1991); Adlai E. Stevenson, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); Dutchess Communications Corp., 101 FCC 2d 243, 253 (Rev. Bd. 1985) and Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332 (1991), all of which were cited by ORA to support its conclusion that an issue should be added against Ringer. However, in this case, Mr. Fry's June 7, 1993 letter is proof positive that Mr. Ringer continues to have "reasonable assurance" of the use of the WBBY-FM tower site. See Exhibit 4.⁶

9. In William F. and Anne K. Wallace, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974), another case cited by ORA, the

had filed their application, a key fact cited by the Board. In this case, Mr. Fry's December 17, 1991 letter shows that Mr. Ringer's obtained "reasonable assurance" of the use of his tower site before he filed his application on December 30, 1991.

10. Finally, Lee Optical and Associated Cos. Retirement and Pension Fund Trust, 2 FCC Rcd 5480, 5486 (Rev. Bd. 1987), the applicant needed, and never received, the consent of a third party for use of its proposed tower site. Here, Mid-Ohio is the only party who's consent Mr. Ringer needs and Mr. Fry's letters are clear proof that this consent has been obtained. Therefore, ORA has not shown that Commission precedent supports the addition a site availability issue here.

ORA's Original Site Assurance

11. One very important fact, that is peculiarly absent from ORA's Motion, is that when ORA originally filed its application for Westerville, on December 30, 1991, it also proposed the WBBY-FM tower site and was relying upon the very same Mid-Ohio site commitment letter that it now says was insufficient.⁷ See Exhibit 5. The letter provided to

⁷ This fact can mean just one of two things. Either ORA believed, at the time it filed its application, that its site commitment letter was insufficient, and it falsely certified its site availability; or ORA knows that this letter is sufficient (and therefore Ringer's letter is also sufficient) and it, nevertheless, filed its Motion against Ringer, an action which would constitute a clear abuse of process. In light of these facts and the specious nature of ORA's arguments, the presiding Judge should consider the addition of appropriate issues against ORA.

ORA and the one to Mr. Ringer were exactly the same, with only the name of the applicants changed in each case. Id. While ORA later amended its application to specify a different tower location (see Exhibit 6), this does not change the fact that, when it originally filed its application, ORA was relying on the same letter it is now criticizing.

12. Furthermore, the letter that ORA received from the owners of its current tower site is no more firm a commitment than the one provided by Mr. Fry. See Exhibit 7. The letter provided to ORA by Hugh and Deloris Buell (the owners of its new tower site) outlines certain terms but also states that "...these terms are subject to renegotiation..." Id. Furthermore, the letter states:

"This correspondence conveys our present firm intention to lease to you the referenced real property, however, this letter does not in and of itself constitute a lease agreement nor it is a binding legal lease or agreement on either party. Upon a grant of the FCC construction permit, we will further negotiate the terms of the lease as are appropriate."

Id. (emphasis added).

13. Therefore, as this letter shows, ORA has no more firm a commitment from the owner of its proposed site than does Ringer. Both parties have "reasonable assurance" of the use of their sites, which is all that the Commission requires. Given these facts, for ORA to find fault with Ringer's site commitment is suspect, to say the least.

Conclusion

14. ORA has failed to raise a substantial and material

question of fact that would warrant enlargement of the issues in this case. See 47 C.F.R. §1.229. It has no evidence, short of pure speculation, to support its conclusions. ORA guessed that Mid-Ohio may have rejected Ringer's financial showing and cancelled its site availability letter but, as Ringer has clearly shown, this was not the case. The attached documents show that Mr. Ringer complied with the Commission's long-established "reasonable assurance" standard with respect to securing a tower site for his Westerville application and that he continues to have an available tower location for use with his proposed FM operation.

WHEREFORE, the above-premises considered, David A. Ringer hereby respectfully requests that the Second Motion To Enlarge Issues filed by ORA be **DENIED**.

Respectfully submitted,
DAVID A. RINGER

By: 

Arthur V. Belendiuk
Shaun A. Maher

His Attorneys

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W., Suite 510
Washington, DC 20036
(202) 785-2800

June 9, 1993

WESTERVI/PIT/OPPMTE2

EXHIBIT 1

Letter from Carl B. Fry to David A. Ringer, December 17, 1991.

Letter from Carl B. Fry to David A. Ringer, December 24, 1991.

MID-OHIO COMMUNICATIONS, INC.
Post Office Box 14
Westerville, Ohio 43081

December 17, 1991

Mr. David Ringer
1000 Urlin Ave., Unit #1017
Columbus, OH 43212

RE: Mid-Ohio Communications, Inc./WBBY-FM/Lease of Assets

Dear Mr. Ringer:

This correspondence is in regard to your recent inquiry pertaining to the lease of certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which is utilized in regard to the broadcast operation of WBBY-FM. You have indicated that you are planning to apply for the broadcast license of WBBY-FM, Westerville, Ohio, and this correspondence is to confirm that should the Federal Communications Commission award you the construction permit, Mid-Ohio Communications, Inc., the former licensee of WBBY-FM, is willing to negotiate appropriate leases with you for certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies in the amount of Six Thousand Dollars (\$6,000.00) per month.

The real estate lease and equipment lease which would commence upon the FCC granting your construction permit would include the use of the tower site (tower and building) located at State Route 37, Sunbury, Ohio 43074; studio facilities located at 14 Dorchester Court, Westerville, Ohio 43081; and equipment utilized in the operation of the station. The equipment would include some or perhaps all of the equipment itemized in the inventory accompanying this correspondence. Failure to lease all of the equipment listed in the inventory will not result in a reduced lease package price. This correspondence conveys an intent to negotiate terms of lease agreements and does not in and of itself constitute lease agreements. Although it is contemplated that mutually acceptable terms will be negotiated in regard to the various leases, there is no guarantee of that occurrence.

Within sixty (60) days of the date of this letter, you must provide Mid-Ohio Communications, Inc. with a showing of financial qualifications satisfactory to Mid-Ohio Communications, Inc. for it to enter into the above-referenced leases. Mid-Ohio Communications, Inc. reserves the right to cancel this letter within sixty (60) days of receipt of your financial information. Notwithstanding the above, at the time you receive the construction permit, Mid-Ohio Communications, Inc. reserves the right to again review your financial condition to determine if you then have financial qualifications satisfactory to Mid-Ohio Communications, Inc. to enter into the above-referenced leases. In regard to a showing of financial strength, if the lessee is a corporation, the principals of lessee will have to personally sign unconditional guarantees in regard to the lease obligations.

Mid-Ohio Communications, Inc. hereby grants you the authority to specify WBBY-FM's transmitter location in your FCC application. We wish you the best of luck in your application for licensure being prepared for filing with the Federal Communications Commission.

Sincerely,

MID-OHIO COMMUNICATIONS, INC.

By: 
Carl P. Fry

WBBY INVENTORY 12/91FRONT OFFICEFIRST FLOORItem

- 1 Double pedestal metal desk
- 1 Brown Steno chair
- 1 Black side chair
- 2 2 Drawer metal filing cabinet
- 1 Panasonic T35 Typewriter
- 1 AT & T PC6300 computer and terminal w/printer
- 1 Sanyo CY5000 DP Calculator
- 1 Bostich EP5 Electric pencil sharpener

LOBBY

- 2 Waiting room side chairs (wood & rust)
- 1 table w/ glass top

SALES OFFICE

2 desks (1 double pedestal & 1 single pedestal)

GENERAL MANAGER OFFICE

- 1 Wooden double Pedestal desk
- 1 Blue executive chair
- 2 Blue side chairs
- 1 2 drawer file cabinet
- 1 Wooden top (credenza type)
- 1 Brass lamp
- 1 Telex Copyette

CONFERENCE ROOM

- 1 Conference table
- 6 side arm chairs
- 1 Credenza
- 1 Sharp SF750 Copier
- 1 Zenith 19" color TV
- 1 Zenith Video tape recorder
- 1 panasonic Microwave oven
- 1 GE small refrigerator
- 1 Presentation board w/ easel
- 1 WBBY old clock

PUBLIC SERVICE OFFICESECOND FLOOR

- 1 Double Pedestal desk
- 2 Steno Chairs
- 1 Diablo printer
- 1 File cabinet
- 1 Panasonic typewriter
- 1 Olivetti 35 typewriter
- 1 Sanyo small refrigerator
- 1 Samsung Classic Microwave oven

MUSIC LIBRARY

- 1 Wood table
- 2 Steno chairs
- 1 Single pedestal desk
- 1 Magnavox CD player
- 1 Toshiba receiver
- 1 AT&T Computer & terminal
- 1 Epson LX810 Printer

PROGRAM DIRECTORS OFFICE

- 1 Double pedestal desk
- 1 Steno chair
- 1 4 drawer file cabinet
- 2 Side chairs
- 1 Utility table
- 1 Stereo table
- 1 Technics Quartz Turntable/synthesizer
- 1 Onkyo Integra Integrated Amp
- 1 Sony C D Player
- 2 SBL Speakers

STUDIOS

- 1 Metal Table
- 1 Steno chair
- 4 Side chairs
- 1 Apple Computer w/ C Itoh Printer
- 1 Panasonic electronic modular switching system
- 1 Code-A-Phone (PVM 7530)

MISCELLANEOUS

- 1 Cobra Scanner #SR900
- 1 Randix Stereo AM/FM Cassette
- 1 Realistic AM/FM Receiver
- 1 Set of Greenwood Sales Teaching books/tapes
- 1 Panasonic portable AM/FM Cassette
- 1 Paper Cutter
- 2 Large waste baskets
- 13 Waste basket
- 15 Large plastic desk floor mats

WBBY ELECTRONIC INVENTORY 12/91

NAME	TYPE	ITEM	NUMBER
<u>CONTROL ROOM STUDIO</u>			
TECHNICS	SP10MK2A	TURNTABLES	3
TECHNICS	SH10EA	POWER UNIT	3
RAMKO	SP8E	TURNTABLE AMP	1
STANTON	310	POWER BOOST/FILTER	2
TECHNICS	1500	2 TRACK REEL/RECORDER	1
BROADCAST AUDIO	SERIES IV	AUDIO CONSOLE	1
COMREX	LXR	RECORDER UNIT	1
FURMAN		STRIP EQUALIZER	1
CARVER	TD1200	CASSETTE TAPE DECK	1
DYNAMAX	CTR10	RECORD PLAY CART DECK	1
DYNAMAX	CTR10	PLAYBACK CART DECK	4
FIDELIPAC	TABLE	TAPE ERASER	1
ELECTRO-VOICE	RE-20	MICROPHONE	2
REALISTIC NOVA	40	HEADSETS	1
BIC VENTURI	FORMULA2	MONITOR SPEAKER	2
RADIO SYSTEMS	TN-1	TABLETOP TIMER	1
STUDER	A727	COMPACT DISC PLAYER	3
REALISTIC MINIMUS	3.5	CUE SPEAKER	2
<u>NEWS STUDIO</u>			
DYNAMAX	CTR10	PLAYBACK CART DECK	1
TECHNICS	SP15	TURNTABLE	1
RAMKO	SP8E	TURNTABLE PRE-AMP	1
ELECTRO-VOICE	RE20	MICROPHONE	1
REALISTIC NOVA	40	HEADSET	1
REALISTIC MINIMUS	3.5	MONITOR SPEAKER	2
FIDELPAC	TABLETOP	ERASER	1
<u>PRODUCTION STUDIO</u>			
RADIO SYSTEMS	TN-1	TIMER	1
REALISTIC MINIMUS	0.3	CUE SPEAKER	2
EPI	A20	MONITOR SPEAKERS	2
TECHNICS	SP15	TURNTABLE	2
RAMKO	SP8E	TURNTABLE PRE-AMP	2
ELECTRO-VOICE	RE20	MICROPHONE	1
TEAC	C3RX	CASSETTE RECORDER	1
STUDER	A725	COMPACT DISC PLAYER	2
DYNAMAX	CTR10	RECORD/PLAY CART DECK	1
DYNAMAX	CTR10	PLAYBACK CART DECK	2

PRODUCTION STUDIO CONT'D

BROADCAST AUDIO

LEXICON	PCM60
TECHNICS	SH8065
OTARI	MX5050
AMPEX	ATR700
FIDELPAC	TABLETOP

12 CHANNEL AUDIO CON.	1
DIGITAL REVER UNIT	1
ST.GRAPHIC EQUALIZER	1
4 CH. REEL RECORDER	1
2 CH. REEL RECORDER	1
ERASER	1

ENGINEERING

MARTI	RR SERIES
GEMINI	MR-2
MARTI	STI.

RECEIVER	1
ANTENNA POSITIONER	1
TRANSMITTER UNIT	2

MID-OHIO COMMUNICATIONS, INC.
Post Office Box 14
Westerville, Ohio 43081

December 24, 1991

Mr. David Ringer
1000 Urlin Avenue, Unit #1017
Columbus, OH 43212

RE: Mid-Ohio Communications, Inc.
WBBY-FM
Lease of Assets

Dear Mr. Ringer:

Enclosed herewith is an addendum to the Inventory previously provided to you.

Sincerely,

MID-OHIO COMMUNICATIONS, INC.

By: Carl B. Fry
Carl B. Fry
Authorized Representative

Attachment

cc: Art Belendiuk, Esq.

DEC 24 '91 11:14 FRY

WBBY SUNBURY EQUIPMENT LIST

P.3/3

LOCATION: C=CONTROL
T=TRANSMITTER

C	TECHNICS SP 10 MKII TURNTABLE	(2)
C	TECHNICS SH 10E POWER UNIT	(2)
C	REALISTIC TURNTABLE PREAMP	(2)
C	STUDER A725 CD PLAYER	(1)
C	AUDICORD E SERIES RECORD CART	(1)
C	AUDICORD E SERIES PLAY CART	(2)
C	MCMARTIN AUDIO CONSOLE	(1)
C	ELECTROVOICE RE-16 MIC	(1)
C	PANASONIC SPEAKERS	(2)
C	PIONEER REEL TO REEL PLAYER	(1)
C	SUNBURY/WESTERVILLE AUDIO CNTRL	(1)
C	KENWOOD CASSETTE DECK	(1)

T	PIONEER RECIEVER	(1)
T	DELTA COAXIAL SWITCH	(1)
T	COAXIAL SWITCH LOCAL CONTROL PANEL	(1)
T	MARTI RMC 15 REMOTE CONTROL	(1)

EXHIBIT 2

Transmittal letter to David A. Ringer's FCC Form 301.

FCC/MELLON

RETURN COPY

DEC 30 1991

LAW OFFICES
SMITHWICK & BELENDIUK, P.C.

TELECOPIER
(202) 785-2804

2033 M STREET, N.W.
SUITE 207
WASHINGTON, D.C. 20036

TELEPHONE
(202) 785-2800

December 30, 1991

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: David A. Ringer
Channel 280A, Westerville, Ohio

Dear Ms. Searcy:

Transmitted herewith, on behalf of David A. Ringer, are an original and two copies of FCC Form 301, Application for Construction Permit for a new station on Channel 280A, at Westerville, Ohio.

Also enclosed is a check in the amount of \$2,030.00 in payment of the filing fee (Fee Code: MTR).

If there are any questions with respect to this matter, please communicate with the undersigned.

Sincerely,



Arthur V. Belendiuk
Counsel for
DAVID A. RINGER

Enc.
AVB/lmv.A1230

cc: Westerville Public File
Mr. David A. Ringer

EXHIBIT 3

**Letter from counsel to Carl B. Fry Esquire with Financial
Statement of David A. Ringer, December 31, 1991.**

LAW OFFICES
SMITHWICK & BELENDIUK, P.C.

TELECOPIER
(202) 785-2804

2033 M STREET, N.W.
SUITE 207
WASHINGTON, D.C. 20036

TELEPHONE
(202) 785-2800

December 31, 1991

Carl B. Fry, Esquire
Fry & Waller Co., L.P.A.
35 East Livingston Avenue
Columbus, Ohio 43215-5762

Re: Mid-Ohio Communications, Inc.
WBRY-FM, Lease of Assets



DAVID A. RINGER
FINANCIAL STATEMENT
NOVEMBER 30, 1991

Reeb, MacLaren & Steedman, Inc.

CERTIFIED PUBLIC ACCOUNTANTS / MEMBERS: AICPA, OSCPA, PCPS

DAVID A. RINGER
COLUMBUS, OHIO

WE HAVE COMPILED THE ACCOMPANYING STATEMENT OF FINANCIAL CONDITION OF DAVID A. RINGER AS OF NOVEMBER 30, 1991 IN ACCORDANCE WITH STANDARDS ESTABLISHED BY THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS.

A COMPILATION IS LIMITED TO PRESENTING IN THE FORM OF FINANCIAL STATEMENTS INFORMATION THAT IS THE REPRESENTATION OF THE INDIVIDUALS WHOSE FINANCIAL STATEMENTS ARE PRESENTED. WE HAVE NOT AUDITED OR REVIEWED THE ACCOMPANYING FINANCIAL STATEMENTS AND, ACCORDINGLY, DO NOT EXPRESS AN OPINION OR ANY OTHER FORM OF ASSURANCE ON THEM.

Reeb, MacLaren & Steedman, Inc.